Sri Mahanum bt Yup (suing as widow to Mohd Yusof bin Sahak, deceased) v Representative of the estate for Raden Benni bin RS Tanuwidjaja, deceased & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-04(IM)-250–06 OF 2018
HAMID SULTAN, YEOH WEE SIAM AND HANIPAH FARIKULLAH JJCA
30 APRIL 2019

Damages (Personal Injury or Death) — Fatal accident — Dependency claim — Employee-passenger in company vehicle driven by co-employee was killed when vehicle was involved in road accident — Deceased employee's estate received monthly contributions from SOCSO following tragedy — Whether s 31 of the Employees Social Security Act 1969 ('the SOCSO Act') barred deceased employee's widow from bringing dependency claim against his employer and employer's servant for negligently causing the death — Whether the death resulted from 'employment injury' sustained by deceased as an employee under the SOCSO Act

A collision on a public road between two vehicles owned by the second respondent ('R2') killed three of R2's employees, namely, the drivers of the two vehicles ('Raden Benni' and 'Ismail Muhamat') and a passenger ('Mohd Yusof') who was in the vehicle driven by Ismail Muhamat. Both vehicles were insured by R2 against third party risks. Mohd Yusof's widow brought a dependency claim under s 7 of the Civil Law Act 1956 (for loss of support, bereavement and funeral expenses) against the estate of Raden Benni and R2 in the sessions court. In a consent judgment, the defendants conceded liability 100% and quantum was agreed at RM66,040. The parties were aware that Mohd Yusof's estate was receiving RM1,000 per month from SOCSO as a result of the death. The defendants subsequently appealed to the High Court contending that the dependency claim was barred under s 31 of the Employees Social Security Act 1969 ('the SOCSO Act'). Section 31 prohibited an insured person (ie, the employee) or his dependants from receiving or recovering from his employer or the employer's servant, any compensation or damages under any other law, in respect of an employment injury sustained as an employee under the SOCSO Act. The prohibition, however, did not apply to any claim arising from a motor vehicle accident where the employer or his servant was required to be insured against third party risks under Part IV of the Road Transport Act 1987 ('the RTA'). Holding that the dependency claim was barred by s 31, the High Court allowed the appeal and set aside the sessions court's decision. In the instant appeal, the appellant argued, inter alia, that the High

Court was wrong to regard Mohd Yusof's death as one caused by an 'employment injury' sustained by him in the course of his employment when he was actually a passenger in a collision which happened on a public road where the vehicles involved were required to be insured against third party risks under the RTA.

Held, allowing the appeal:

(1) It was for the defendants (respondents) to establish that Mohd Yusof died as a result of an 'employment injury' sustained as an employee under the SOCSO Act. By no sense of imagination would any reasonable tribunal appraised of the facts come to the conclusion that it was an 'employment injury' sustained as an employee (see para 12(a)).

(2) It was arguable whether 31 of the SOCSO Act covered a situation of death as opposed to injury as no submissions were made on this point. However, a dictionary meaning of injury did not generally refer to death (see para 12(c)).

[Bahasa Malaysia summary

Suatu pelanggaran atas jalan raya awam antara dua kenderaan yang dimiliki oleh responden kedua ('R2') telah membunuh tiga pekerja R2, iaitu, pemandu-pemandu dua kenderaan itu ('Raden Benni' dan 'Ismail Muhamat') dan seorang penumpang ('Mohd Yusof') yang berada dalam kenderaan yang dipandu oleh Ismail Muhamat. Kedua-dua kenderaan itu dinsuranskan oleh R2 terhadap risiko pihak ketiga. Balu Mohd Yusof telah membuat tuntutan tanggungan di bawah s 7 Akta Undang-Undang Sivil 1956 (untuk kehilangan sokongan, perbelanjaan pengebumian dan perkabungan) terhadap harta pusakan Raden Benni dan R2 di mahkamah sesyen. Dalam penghakiman persetujuan, defendan-defendan mengakui liabiliti 100% dan kuantum telah dipersetujui sebanyak RM66,040. Pihak-pihak menyedari bahawa harta pusaka Mohd Yusof menerima RM1,000 setiap bulan daripada PERKESO akibat kematian itu. Defendan-defendan kemudiannya telah membuat rayuan kepada Mahkamah Tinggi menegaskan bahawa tuntutan tanggungan itu dihalang di bawah s 31 Akta Keselamatan Sosial Pekerja 1969 ('Akta PERKESO'). Seksyen 31 melarang seorang yang diinsuranskan (iaitu pekerja) atau tanggungannya daripada menerima atau mendapat balik daripada majikannya atau pekerja majikannya, apa-apa pampasan atau ganti rugi di bawah mana-mana undang-undang lain, berkaitan kecederaan pekerjaan yang dialami sebagai pekerja di bawah Akta PERKESO. Larangan itu, bagaimanapun, tidak terpakai kepada mana-mana tuntutan yang timbul daripada kemalangan kenderaan motor di mana majikan atau pekerja dikehendaki untuk diinsuranskan terhadap risiko pihak ketiga di bawah Bahagian IV Akta Pengangkutan Jalan Raya 1987 ('APJ'). Dengan memutuskan bahawa tuntutan tanggungan itu dihalang oleh s 31, Mahkamah Tinggi membenarkan rayuan itu dan mengetepikan keputusan mahkamah

sesyen. Dalam rayuan ini, perayu berhujah, antara lain, bahawa Mahkamah Tinggi terkhilaf keran menganggap kematian Mohd Yusof sebagai suatu yang diakibatkan oleh 'employment injury' yang dialami olehnya semasa menjalankan tugasnya apabila dia sebenarnya penumpang dalam pelanggaran yang berlaku atas jalan raya awam di mana kenderaan yang terlibat dikehendaki untuk diinsuranskan terhadap risiko pihak ketiga di bawah APJ.

Diputuskan, membenarkan rayuan:

(1) Ia adalah untuk defendan-defendan (responden-responden) untuk membuktikan bahawa Mohd Yusof telah meninggal dunia akibat 'employment injury' yang dialami sebagai pekerja di bawah Akta PERKESO. Tidak masuk akal bagi mana-mana tribunal menilai fakta tersebut akan membuat kesimpulan bahawa ia adalah 'employment injury' yang dialami oleh pekerja (lihat perenggan 12(a)).

(2) Ia boleh dihujahkan sama ada s 31 Akta PERKESO meliputi keadaan kematian berbanding dengan kecederaan kerana tiada hujah dibuat berhubung perkara ini. Walau bagaimanapn, maksud kamus kecederaan secara amnya tidak merujuk kepada kematian (lihat perenggan 12(c)).]

Notes

For cases on dependency claim, see 6(1) *Mallal's Digest* (5th Ed, 2015) paras 511–545.

Cases referred to

Tirumeniyar a/l Singara Veloo v Malaysian Motor Insurance Pool [2017] 6 MLJ 776; [2017] 8 CLJ 682, CA (not folld)

Legislation referred to

Courts of Judicature Act 1964 s 42
Employees Social Security Act 1969 s 31
Road Transport Act 1987 s 91(1), (1)(aa)

Appeal from: Civil Suit No JA-12A-15 of 2017 (High Court, Johor Bahru)

Tay Cho Sing (YP Tan & Ong) for the appellant.
Ong Chee Yong (CY Ong & Co) for the respondents.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant/plaintiff's appeal against the decision of the High Court which overruled the decision of the sessions court whilst interpreting s 31 of the Employer Social Security Act 1969 ('the Socso Act') with ss 91(1) and 91(1)(aa) of the Road Transport Act 1987 ('the RTA 1987').

[2] The plaintiff, on behalf of the deceased is making the claim. The deceased was the employee of the second defendant. He was also a passenger in the vehicle owned by the second respondent. Accident took place between two vehicles owned by the second respondent in consequence of the negligence of the drivers.

[3] This judgment is delivered pursuant to s 42 of the Courts of Judicature Act 1964 ('the JCA') as our sister Yeoh Wee Siam has since retired. This is a unanimous decision by the remaining members of the panel who heard the appeal.

PRELIMINARIES

[4] The learned High Court judge summary of the decision read as follows:

> [2] In the sessions court it was agreed that liability was 100% against defendants and quantum for loss of support at RM57,120, bereavement at RM10,000 and funeral expenses at RM3,000. It was further agreed that plaintiff had claimed from Socso and was receiving RM1,000 per month.
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> [3] It was held by the sessions court that s 31 of the Employees Social Security Act 1969 ('the Socso Act') does not prohibit plaintiff's claim against defendants. On appeal, this court decided otherwise and held that s 31 of the Socso Act prevents the plaintiffs claim. This is the appeal by the plaintiff.

[5] The memorandum of appeal of the appellant, inter alia, read as follows:

1. Yang Arif Hakim Mahkamah Tinggi telah gagal mempertimbangkan kemalangan yang menyebabkan kematian simati adalah kemalangan jalanraya dan proviso Seksyen 31 Employees Social Security Act 1969 diterimapakai. Hakim Mahkamah Tinggi yang bijaksana terkhilaf dari segi undang-undang apabila membenarkan rayuan Perayu-perayu (Defendan-Defendan) dengan memutuskan bahawa tuntutan Plaintif dihalang oleh Seksyen 31 Akta Keselamatan Sosial Pekerja 1969 (AKSP 1969). Sebaliknya di sini adalah suatu kemalangan jalanraya dan bukanlah 'employment injury' dan 'proviso' Seksyen 31 AKSP 1969 di terima pakai. Sila lihat kes *Pelita Rasa Sdn Bhd & Ors v Theeban Vengadesh Govintarau* [2015] 2 CLJ 593 dan *Indah Water Konsortium Sdn Bhd v Govindarajan Alagar* [2014] 9 CLJ 812.
2. Yang Arif Hakim Mahkamah Tinggi telah tersilap menggunapakai Seksyen 91(1)(aa) Akta Pengangkutan Jalanraya 1987 dan memutuskan bahawa simati sedang *in the course of employment* dengan Defendan Kedua pada masa material.
3. Yang Arif Hakim Mahkamah Tinggi telah gagal menerimapakai Seksyen 91(1)(bb) Akta Pengangkutan Jalanraya 1987 seperti yang diputuskan oleh Hakim Mahkamah Sesyen Bahawa simati adalah seorang penumpang. Oleh itu simati adalah seorang 'passenger carried by in

pursuance of contract of employment' pada masa material Seksyen 91(1)(bb) Akta Pengangkutan Jalanraya 1987 seharusnya diterimapakai.

4. Yang Arif Mahkamah Tinggi telah tersilap dan terkhilaf apabila tidak mempertimbangkan bahawa halangan dalam Seksyen 31 Akta Socso tidak terpakai dalam kes semasa kerana kemalangan yang menyebabkan kematian simati adalah satu kemalangan jalanraya dan motokar yang dipandu oleh Defendan Pertama dan di miliki oleh Defendan Kedua adalah motokar yang dikehendaki diinsurans menurut Akta Pengangkutan Jalan 1987. Proviso s 31 Socso Act mengatakan ... where the employer or servant of the employer is required to be insured against Third Party Risks (di mana polisi insuran pihak ketiga telah diambil oleh Defendan dalam kes semasa) manakala s 91(1) RTA mengatakan ... provided that such policy shall not be required to cover ... (yang berkaitan dengan skop liability pihak insuran).

5. Yang Arif Mahkamah Tinggi telah tersilap dan terkhilaf apabila mengatakan 'proviso' seksyen 31 AKSP 1969 tidak terpakai dalam kes di sini dengan mengatakan fakta di sini tidak diwajibkan untuk menginsurankan berdasarkan seksyen 91(aa) Akta Pengangkutan Jalan 1987 terpakai dan seksyen 91(bb) APJ 1987 tidak terpakai. Hakim Mahkamah Tinggi tersilap dan terkhilaf kerana seksyen 91(1)(bb) APJ 1987 adalah specific, as it is specifically covers the scenario for passengers. As the scenario falls into s 91(1)(bb) RTA 1987 then the motor vehicle is required to be insured against Third Party Risks under Part IV of the RTA 1987 and therefore the proviso applies. S 91(1) RTA 1987 states ... Provided that such policy shall not require to cover ... s 91(1)(bb) RTA 1987 states except in the case of a motor vehicle in which passengers are carried ... or by reason of or in pursuance of a contract of employment liability in respect of the death of ... to persons being carried ... It is clear that the motorjeep No WPW 4068 is required to be insured as Mohd Yusof is travelling as a passenger in motorjeep No WPW 4064 and s 91(1)(bb) RTA 1987 will prevail over s 91(1)(a) RTA 1987 as it is a specific provision which prevail over s 91(1)(aa) as it is a general provision.

6. Yang Arif Hakim Mahkamah Tinggi telah tersilap dan terkhilaf apabila gagal mempertimbangkan bahawa Defendan Pertama adalah pemandu yang dibenarkan (*authorized driver*) oleh Defendan Kedua dan polisi insurans yang melindungi motokar Defendan juga melindungi Defendan Pertama (selaku *authorized driver*) dan Defendan Pertama bukanlah majikan kepada simati pada masa material dan oleh itu Sekyen 31 Akta Socso dan Seksyen 91(1)(aa) Akta Pengangkutan Jalanraya 1987 tidak terpakai.

7. Yang Arif Hakim Mahkamah Tinggi tersilap dan terkhilaf kerana tidak mengikut doctrine stare decisis as *Tirumeniyar Singara Veloo* [2017] 8 CLJ 682 is the case of Court of Appeal. '... the purported tortfeasor is the first defendant who is the authorized driver of the second defendant (the insured). Under the general law of negligence, the first defendant (insured driver) will be liable to the third defendant (Plaintiff) if he is found liable.

The policy terms specifically state that it will indemnify the authorized driver. That is to say, not only the policy covers the relationship between the second defendant (the insured) and the insurer but over above it extends the coverage also to an authorized driver. In the case here Mohd Yusof Bin Sahak deceased is not the employee of the authorized driver Raden Benni Bin RS Tanuwidjaja (1st Respondent) and hence s 91(1)(aa) RTA 1987 did not apply.

Oleh yang demikian, Perayu memohon agar Rayuan dibenarkan dengan kos dan keputusan Mahkamah Tinggi diketepikan.

[6] Section 31 of the Socso Act read as follows:

31 Liability of employer and his servant

An insured person or his dependants shall not be entitled to receive or recover from the employer of the insured person, or from any other person who is the servant of the employer, any compensation or damages under any other law for the time being in force in respect of an employment injury sustained as an employee under this Act: Provided that the prohibition in this section shall not apply to any claim arising from motor vehicle accidents where the employer or the servant of the employer is required to be insured against Third Party Risks under Part IV of the Road Transport Act 1987 [Act 333].

[7] Section 91(1) of the RTA 1987 read as follows:

91 Requirements in respect of policies

(1) In order to comply with the requirements of this Part, a policy of insurance must be a policy which —

(a) is issued by a person who is an authorized insurer within the meaning of this Part; and

(b) insures such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road: Road Transport 117 Provided that such policy shall not be required to cover —

(aa) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or

(bb) except in the case of a motor vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting onto or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise; or

(cc) any contractual liability.

[8] At the outset, we must say that the plaintiff's claim is related to the deceased who was a passenger. Section 91(1) of the RTA 1987 principally deals with a third party risks. We do not see how the third party risk will involve a passenger to attract s 91(1) of the RTA 1987 and its jurisprudence. The facts of the case has no relevance to the facts related to the Court of Appeal's decision in *Tirumeniyar a/l Singara Veloo v Malaysian Motor Insurance Pool* [2017] 6 MLJ 776; [2017] 8 CLJ 682. In addition, it is trite that the Socso Act as well as the RTA 1987 are social legislation and in consequence, any judicial interpretation of these statutes must necessarily lean in favour of the employee as opposed to the employer unless the clear terms of the statute is not in favour of the employee.

[9] The confusion in this case arises in consequence of the collision of two vehicles owned by the second defendant itself. If both the vehicles are owned by two different parties, s 91(1) of the RTA 1987 will be a non-issue. That is to say, the insurer for the second defendant must indemnify the deceased in respect of the plaintiff's claim.

[10] Section 31 of the Socso Act relates to employment injury. In a strict sense, the deceased being a passenger cannot be accused of having being injured in consequence of an employment injury when the collision was between two vehicles. In addition, it was a finding of fact of the learned sessions judge that it was not an employment injury but a motor vehicle accident.

BRIEF FACTS AND ISSUES RAISED IN THIS APPEAL

[11] The brief facts of this case and issues raised in this appeal had been summarised by the appellant as follows:

1. *Brief Facts*

   (a) This is a dependency claim by the Plaintiff the widow of Mohd Yusof Bin Sahak (deceased).

   (b) An accident occurred on 5.2.2015 at a public road involving 2 motorjeeps WPW 4064 and WPW 4068.

   (c) The deceased was a passenger in Motorjeep No WPW 4064 which was driven by Ismail Bin Muhamat who has also passed away in the accident.

   (d) Motorjeep No WPW 4068 was driven by Raden Benni Bin RS Tanuwidjaja (deceased). (1st Defendant)

   (e) Both motorjeeps are owned by Korakan Corporation Sdn Bhd (2nd Defendant) which are insured by Zurich Insurance Malaysia Berhad (formerly Malaysian Assurance Alliance).

   (f) At the material time all three deceased i.e. the Plaintiffs husband, the driver of motorjeep WPW 4064 and 1st Defendant are employees of

Korakan Corporation Sdn. Bhd. (2nd Defendant). The deceased occupation is as a driver for the 2nd Defendant.

(g) The Plaintiff filed a suit against the 1st and 2nd Defendants as authorized driver and owner of motor vehicle WPW 4068 for the loss of support, bereavement and funeral expenses under section 7 Civil Law Act 1956.

(h) Consent judgment with regards to liability was recorded which was 100% against the Defendant and quantum was agreed at RM 66,040.00.

(i) The Defendants however submit that the claim was barred by Section 31 Socso Act.

(j) The Sessions Court allowed the Plaintiffs claim stating that the Plaintiff's claim was not barred by Section 31 of the Socso Act.

(k) The Defendants filed an appeal with the High Court wherein the High Court Judge allowed the Appeal and reversed the findings of the Sessions Court Judge.

(l) Hence this appeal.

2. *Issues raised in the Appeal*

(a) Whether the Plaintiff's claim is prohibited by Section 31 Socso Act.

(b) Whether the proviso in Section 31 Socso Act applies to the present claim.

(c) Whether Section 31 Socso Act should be read together with Section 91 of the RTA with regards to the meaning of insured against third party risk.

(d) Whether the proviso in Sec 91(1)(aa) RTA applies to the Plaintiffs claim.

(e) The relation between the proviso Sections 91(1)(aa) RTA and 91(1)(bb) RTA when read together.

(f) Whether there is double compensation in the plaintiff claim i.e. whether the Socso claim by the deceased is deductible / taken into account in the present claim.

[12] We have read the appeal records and the able submissions of the parties. After giving much consideration to the submissions of the respondents, we take the view that the appeal must be allowed. Our reasons, inter alia, are as follows:

(a) it is important to note before dwelling into the provision of the RTA 1987, it is a strict test that it is for the defendants to establish that indeed it was an employment injury as well as it was sustained as an employee under the Act. By no sense of imagination will any reasonable tribunal appraised of the fact will come to the conclusion that it is indeed an employment injury sustained as an employee. Courts have over the years, strictly construed in the course of employment narrowly to favour the employee rather than the employer;

(b) we do not think this is a fit and proper case to discuss s 91(1)(aa) of the

RTA 1987 or the case of *Tirumeniyar*. Section 91(1) of the RTA 1987 is relevant to third party risk. Third party risk can only be applicable generally to the owner of the vehicle as well as the driver of the vehicle. This was clearly explained in the case of *Tirumeniyar*. In addition, it is also the finding of the trial court judge that it was not an employment injury; and

(c) further, it is arguable whether s 31 of the Socso Act will cover situation of death as opposed to injury. We do not wish to dwell on this issue as there was no submission, save to say a dictionary meaning of injury does not generally refer to death.

[13] For reasons stated above, we take the view that the appeal must be allowed in limine, with costs to the appellant.

We hereby order so.

Appeal allowed.

Reported by Ashok Kumar